IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISON

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	Nos. CP-14-CR-2421-2011 &
	)	CP-14-CR-2422-2011
GERALD A. SANDUSKY	)	
Commonwealth Attorneys:		*Joseph McGettigan, Esquire* *Jonelle H. Eshbach, Esquire*
Defense Attorney:		*Joseph L. Amendola, Esquire*

BRIEF IN SUPPORT OF DEFENDANT'S SUPPLEMENTAL PRE-TRIAL MOTIONS/MOTIONS IN LIMINE

TO THE HONORABLE JOHN M. CLELAND, SENIOR JUDGE SPECIALLY ASSIGNED TO THESE MATTERS IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA:

I. PROCEDURAL HISTORY

On or about November 5, 2011, the Defendant was arrested in Criminal Information No. CP-14-CR-2422-2011 by Cpl. Scott F. Rossman of the Pennsylvania State Police, Avondale Barracks and Agent A.L. Sassano of the Pennsylvania Office of Attorney General and charged with various offenses stemming from conduct which allegedly occurred on diverse dates between January 1994 and December 2008, in College Township, Centre County, Pennsylvania and various other locations. On or about December 7, 2011, the Defendant was arrested in Criminal Information No. CP-14-CR-2421-2011 by Trooper Robert Yakicic of the Pennsylvania State Police, Bureau of Criminal Investigations, and Agent A.L. Sassano of the Pennsylvania Office of Attorney General, and charged with additional offenses stemming from conduct which allegedly occurred on or about January 1997 to December 2008 in College Township, Centre

County, Pennsylvania and various other locations. On December 13, 2011, the Defendant waived his preliminary hearing in these matters, and thereafter, waived his arraignment on January 11, 2012. The Defendant also filed a Request for Bill of Particulars with the Commonwealth on or about January 18, 2012, and thereafter filed an Application for Order for Bill of Particulars on or about January 24, 2012 and a Motion to Compel Commonwealth to Provide Defendant with Pre-Trial Discovery Materials on or about February 6, 2012.

Following a hearing on February 10, 2012, this Court entered an Order on February 13, 2012 regarding Defendant's Motion To Compel Pre-Trial Discovery as a result of which the Commonwealth subsequently provided additional discovery materials to Defendant's counsel on or about January 17, 2012, January 23, 2012, March 7, 2012 and March 12, 2012 comprised of hundreds of pages of information. Following a hearing on February 10, 2012 and by Order dated February 13, 23012, this Court directed the Commonwealth to answer portions of the Defendant's Bill of Particulars including the exact time, date, and location of any offense giving rise to the particular offenses as alleged in the Information, the exact age of the alleged victim on the date of the offense, and an explanation from the Commonwealth as to why it could not provide certain information in the event the Commonwealth failed to comply completely with the Court's Order.

The Commonwealth provided Defendant's counsel with a Bill of Particulars dated February 21, 2012 on or about March 1, 2012 as well as a Response to the Order of Court Directing Pre-Trial Discovery on or about February 29, 2012 in which it failed to provide the Defendant with a number of items, materials and documents he had

requested in his Bill of Particulars and Motion to Compel Discovery. In its Response dated February 29, 2012 to the Court's Order dated February 13, 2012 directing the Commonwealth to provide discovery to the Defendant, the Commonwealth alleged various reasons why it could not or would not provide certain materials to the Defendant and stated its position that many of the materials requested by the Defendant constituted Grand Jury materials which were non-discoverable, certain matters were irrelevant, and other information concerning psychological evaluations, juvenile adjudications and juvenile police investigations, and Children and Youth Services' reports and related information were confidential and/or privileged and not subject to discovery by the Defendant. On or about March 2, 2012, the Defendant filed an Application for Order for a More Specific Bill of Particulars with argument held before the Court on March 12, 2012. In its Order dated March 13, 2012, the Court dismissed the Application for a More Specific Bill of Particulars as moot stating in part the Commonwealth had clearly represented it could not provide the Defendant with a more specific Bill of Particulars.

The Defendant filed his Omnibus Pre-Trial Motion pursuant to the Court's Order dated February 29, 2012 on or about March 22, 2012, which included a Motion for Continuance, and the Commonwealth filed its Answer to Defendant's Omnibus Pre-Trial Motion on or about March 29, 2012. As the result of a hearing on the Defendant's Omnibus Pre-Trial Motion on April 5, 2012, in its Order dated April 12, 2012, the Court denied without prejudice certain issues raised by the Defendant including Defendant's Motion to Dismiss/Due Process/Non-Specificity of Allegations Contained in Criminal Informations and Petition for *Writ of Habeas* Corpus. The Court subsequently scheduled a pre-trial conference to be held on May 16, 2012 and directed the Defendant, through

counsel, to file motions in limine and any additional supplemental motions at that time. The Defendant, through counsel, has filed supplemental motions including motions in limine which are the subject of this Brief.

II. LEGAL ARGUMENT

A. Motion in Limine No. 1 - Motion to Dismiss/Due Process/Non-Specificity of Allegations Contained in Criminal Informations

In Criminal Information No. CP-14-CR-2421-2011, the Commonwealth has charged the Defendant with twelve (12) separate offenses related to his alleged illegal contact with Accusers/Alleged Victims 9 and 10 inclusive. In Criminal Information No. CP-14-CR-2422-2011, the Commonwealth has charged the Defendant with forty (40) separate offenses related to his alleged illegal contact with Accusers/Alleged Victims 1 through 8 inclusive. As a result of the non-specific allegations contained in numerous counts of both of the aforementioned Criminal Informations, the Defendant requested a Bill of Particulars from the Commonwealth on or about January 18, 2012 following which, in the absence of a timely reply from the Commonwealth, the Defendant filed an Application for a Bill of Particulars with this Court on or about January 24, 2012 as well as a Motion to Compel Discovery on February 6, 2012. Following a hearing on February 10, 2012, this Court entered an Order on February 13, 2012, directing the Commonwealth to respond to certain parts of the Defendant's Request for Bill of Particulars and the Defendant's Motion to Compel Discovery. The Commonwealth provided Defendant's counsel with a Bill of Particulars dated February 21, 2012 on or about March 1, 2012 and a Response to the Order of the Court Directing Pre-Trial Discovery on February 29, 2012.

On March 2, 2012, after reviewing the aforementioned Bill of Particulars and Response to the Court's Order directing pre-trial discovery, Defendant's counsel filed an Application for a More Specific Bill of Particulars, a hearing on which was held by this Court on March 12, 2012. On March 13, 2012, this Court entered an Order in regard to Defendant's Application for a More Specific Bill of Particulars in which it indicated the issue was moot and the Court was dismissing the Defendant's Application because the Commonwealth had made it clear at the hearing on the Application on March 12, 2012 it could not provide the Defendant with more specific answers to the Defendant's request for additional information regarding the charges filed against him by the Commonwealth.

The Defendant submits the allegations set forth in Criminal Information No. CP-14-CR-2421-2011 relating to Counts 1 through 12 and dealing with the Defendant's alleged illegal contact with Accusers/Alleged Victims 9 and 10 are so general and non-specific that the Defendant cannot adequately prepare a defense to those charges. The Defendant also submits the allegations set forth in Criminal Information No. CP-14-CR-2422-2011 relating to Counts 1 through 6 inclusive dealing with Defendant's alleged illegal contact with Accuser/Alleged Victim 1, Counts 12 through 15 dealing with Defendant's alleged illegal contact with Accuser/Alleged Victim 3, Counts 16 through 23 dealing with Defendant's alleged illegal contact with Accuser/Alleged Victim 4, Counts 24 through 27 dealing with Defendant's alleged illegal contact with Accuser/Alleged Victim 5, and Counts 32 through 35 dealing with Defendant's alleged illegal contact with Accuser/Alleged Victim 7 are so general and non-specific that the Defendant cannot adequately prepare a defense to those charges. The Defendant submits he cannot

adequately prepare a defense to the aforementioned allegations due to their non-specificity.

The Commonwealth has failed to provide the dates of the commission of the aforementioned alleged offenses with reasonable certainty and with sufficient particularity in order for the Defendant to adequately prepare his defense, and has advised the Court and the Defendant it cannot provide more specific information and details as to times, dates and locations of the aforementioned alleged offenses, thus violating the notion of fundamental fairness embedded in our legal process. The Defendant submits his due process rights under the Sixth Amendment to the U.S. Constitution as made applicable to the Commonwealth of Pennsylvania through the Fourteenth Amendment as well as his due process rights under the due process clause of the Constitution of the Commonwealth of Pennsylvania will be violated if he is forced to proceed to trial on the aforementioned charges because he cannot adequately prepare and present a defense to those charges due to the lack of specificity contained therein.

In *Commonwealth v. Devlin*, 460 Pa. 508, 333 A.2d 888 (1975), the Supreme Court held that the prosecution must fix the date when an alleged offense occurred with reasonable certainty. A *Devlin* claim is a form of motion in arrest of judgment. *Commonwealth v. Fanelli*, 377 Pa. Super. 555, 547 A.2d 1201, 1203 (1988) (*en banc*). If the claim made by the defendant is meritorious, the Court held the proper remedy is to vacate judgment of sentence and discharge the defendant. See *Commonwealth v. Thek*, 376 Pa. Super. 390, 546 A.2d 83, 90 (1988). While the Commonwealth may be entitled to "a reasonable measure of flexibility when faced with the special difficulties involved in ascertaining the date of an assault upon a young

child", Commonwealth v. Groff, 378 Pa. Super. 353, 362, 548 A.2d 1237, 1241 (1988); See also Commonwealth v. Fanelli, supra and Commonwealth v. Niemetz, 282 Pa. Super. 431, 422 A.2d 1369 (1980), on the other hand, in order to ensure a fair trial for the defendant, the Commonwealth is expected to conduct a thorough examination and come forward with any evidence which [sic] indicates when the alleged crime is most likely to have taken place. Commonwealth v. Groff, supra. Aside from the preparation for and presentation of an alibi defense, other reasons also may exist to find that the actual date of the commission of an alleged offense is critical. For example, the lack of specificity may preclude the accused from attacking the credibility or story of the complaining witness. See Commonwealth v. Devlin, supra.

The Superior Court in Commonwealth v. Levy, 146 Pa. Super. 564, 570 23 A.2d 97, 99 (1941), held that:

> [W]here a particular date or day of the week is not of the essence of the offense, the date laid in the indictment is not controlling, but some other reasonably definite date must be established with sufficient particularity to advise the jury and the defendant of the time the Commonwealth alleges the offense was actually committed, and to enable the defendant to know what dates and period of time he must cover if his defense is an alibi.

The general rule is that the Commonwealth is not bound by the date laid in the bill of indictment but can show any date within the statutory period and prior to the finding of the indictment, except in cases where time is of the essence of the offense. Commonwealth v. Boyer, 216 Pa. Super. 286, 288-89, 264 A.2d 173, 175 (1970), *quoting* Commonwealth v. Levy, 146 Pa. Super. 564, 571 23 A.2d 97, 100 (1941). Time is considered of the essence when the defendant presents an alibi

defense to the offense charged, *Commonwealth v. Boyer, supra*, or is in some other way prejudiced in his defense by the date set forth in the indictment. *See* *Commonwealth v. Swint*, 465 Pa. 450, 350 A.2d 851 (1976).

The Superior Court addressed the issue of dismissal on due process grounds extensively in *Commonwealth v. Groff, supra* when it stated:

> Here, as elsewhere, 'The pattern of due process is picked out in the facts and circumstances of each case.' Due process is not reducible to a mathematical formula. Therefore, we cannot enunciate the exact degree of specificity in the proof of the date of a crime which will be required or the amount of latitude which will be acceptable. Certainly, the Commonwealth need not always prove a single specific date of the crime. Any leeway permissible would vary with the nature of the crime and the age and condition of the victim, balanced against the rights of the accused.
>
> *See* *Commonwealth v. Groff*, 378 Pa. Super. 353, 361-62, 548 A.2d 1237, 1241 (1988).

See also *Commonwealth v. Devlin, supra*, 460 Pa. at 515-16, 333 A.2d at 892. In *Devlin* the Supreme Court cited the dissenting Superior Court opinion in *Devlin* by Judge Spaeth whose opinion sheds additional light on how this balancing test should be applied. Judge Spaeth wrote:

> I do not wish to imply that when dealing with a victim who is a young child or who has no greater mental and emotional capacity than a young child the Commonwealth must always prove the actual date of the crime.... Rather, the fact that the victim is emotionally young and confused should be weighed against the right of the defendant to know for what period of time he may be called upon to account for his behavior. The fact that the victim cannot set a date for the crime should not necessarily be fatal to the Commonwealth's case, thus making the assailant virtually immune from prosecution. In the present case, this balance tips against the Commonwealth, for it does not appear why the Commonwealth could not have fixed the time of the incident by evidence other than by the testimony of the victim.

Commonwealth v. Devlin, 225 Pa. Super. 138, 141-42, 310 A.2d 310, 312 (1973) (Spaeth, J., dissenting), *rev'd* 460 Pa. 508, 333 A.2d 888 (1975).

In Commonwealth v. Devlin, supra, the defendant was accused of having sodomized a mentally retarded adult with the mental ability of a first or second grade child and the emotional stability of an even younger child. The only proof offered at trial was that the crime occurred at some unspecified time during the fourteen-month period from February, 1971 to April, 1972. Although this entire period fell within the statute of limitations, the defendant argued that the Commonwealth's allegation as to the time of the criminal episode was so vague that he was effectively precluded from preparing a defense to the charges against him. The Pennsylvania Supreme Court agreed, and found that the defendant's trial had been so fundamentally unfair as to be inconsistent with due process.

In most, if not virtually all, of those cases in which the courts have given the Commonwealth greater latitude in establishing timeframes when crimes were allegedly committed, these cases involved crimes allegedly committed against young children. In the instant cases before the Court, the Accusers/Alleged Victims were no younger than nine (9) or ten (10) years old and in several instances were teenagers at the time the Defendant allegedly had inappropriate contact with them. The Defendant submits the fact that his Accusers were considerably older than the very young children who were allegedly victimized in those cases involving wide latitude as to timeframes places the prosecution against the Defendant in these matters in a very different perspective and requires more specific timeframes so the Defendant can adequately prepare a defense to the charges filed against him in these matters.

For all the aforementioned reasons, the Defendant submits Counts 1 through 12 inclusive in Information No. CP-14-CR-2421-2011 and Counts 1 through 6, 12 through 27 and 32 through 35 in Information No. CP-14-CR-2422-2011 lack specificity and are so generalized that they fail to adequately provide the Defendant with sufficient notice to prepare his defense to those charges and violate his right to due process of law under the Sixth Amendment to the U.S. Constitution as applied to the Commonwealth through the Fourteenth Amendment as well as under the due process clause of the Constitution of the Commonwealth of Pennsylvania.

B. Motion in Limine No. 2 – Petition for *Writ of Habeas Corpus*

The Defendant submits the Commonwealth cannot establish sufficient evidence at his trial to warrant presenting certain charges to the jury for its consideration in regard to Counts 7 through 11 dealing with Alleged Victim No. 2, Counts 28 through 31 dealing with Accuser/Alleged Victim No. 6, and Counts 36 through 40 dealing with Accuser/Alleged Victim 8 of Criminal Information No. CP-14-CR-2422-2011.

In regard to the charges related to Alleged Victim 2, which are set forth in Count 7, Involuntary Deviate Sexual Intercourse in violation of 18 Pa. C.S.A. Section 3123(a)(7) – (F1); Count 8, Indecent Assault in violation of 18 Pa. C.S.A. Section 3126(a)(8) – (M2); Count 9, Unlawful Contact with Minors in violation of 18 Pa. C.S.A. Section 6318(a)(1) – (F1); Count 10, Corruption of Minors in violation of 18 Pa. C.S.A. Section 6301(a)(1) – (M1); and Count 11, Endangering Welfare of Children in violation of 18 Pa. C.S.A. Section 4304(a)(1) – (M1) as set forth in Criminal Information No. CP-14-CR-2422-2011, the Defendant submits the Commonwealth cannot present sufficient

evidence to sustain these charges at trial. The Defendant submits that, since the Commonwealth has stated the Alleged Victim in regard to Counts 7 through 11 of the Information filed against him in these matters appears to be unknown, the Commonwealth cannot sustain these charges at trial simply based upon the testimony of Michael McQueary. The Defendant also submits the testimony of Michael McQueary, standing alone, as to the offenses set forth in Counts 7 through 11 of No. CP-14-CR-2422-2011 is insufficient to establish the charges set forth by the Commonwealth. Michael McQueary testified at the preliminary hearings for Timothy Curley and Gary Schultz on December 16, 2011 about the 2002 or 2001 incident, and his testimony did not establish sufficient evidence to support these charges being submitted to the jury at the Defendant's trial. The testimony of Michael McQueary from the December 16, 2011 preliminary hearings of Timothy Curley and Gary Schultz was previously submitted to the Court and the Commonwealth as Exhibit "A" in the Defendant's Omnibus Pre-Trial Motion.

The Defendant further submits Timothy Curley and Gary Schultz are critical witnesses in regard to the charges relating to Alleged Victim 2 inasmuch as he anticipates the testimony of Timothy Curley and Gary Schultz will directly impeach the testimony of Michael McQueary. The Defendant submits, if subpoenaed as witnesses at his trial, Timothy Curley and Gary Schultz will invoke their Fifth Amendment privilege, pursuant to information provided to Defendant's counsel through counsel for Mr. Curley and Mr. Schultz. The Defendant submits his right to due process under the Sixth Amendment to the U.S. Constitution as made applicable to the Commonwealth through the Fourteenth Amendment to the U.S. Constitution as well as the due process clause of the Constitution

of the Commonwealth of Pennsylvania will be irreparably violated, and he will be effectively foreclosed from presenting a defense as to these charges if he is unable to call Timothy Curley and Gary Schultz as witnesses at his trial. The unavailability of Timothy Curley and Gary Schultz to appear as witnesses at the Defendant's trial have formed part of the basis for the Defendant's request for a continuance of these matters until these two (2) other individuals are available to testify on his behalf at his trial.

In regard to the charges related to Accuser /Alleged Victim No. 6, which are set forth in Count 28, Indecent Assault in violation of 18 Pa. C.S.A. Section 3126(a)(7) – (M1); Count 29, Unlawful Contact with Minors in violation of 18 Pa. C.S.A. Section 6318(a)(1) – (F3); Count 30, Corruption of Minors in violation of 18 Pa. C.S.A. Section 6301(a)(1) – (M1); and Count 31, Endangering Welfare of Children in violation of 18 Pa. C.S.A. Section 4304(a)(1) – (M1) as set forth in Criminal Information No. CP-14-CR-2422-2011, the Defendant submits the Commonwealth cannot present sufficient evidence to sustain these charges at trial since the anticipated testimony of Commonwealth witnesses including Accuser/Alleged Victim 6 will not establish that any sexual contact took place between the Defendant and Accuser/Alleged Victim 6 in 1998 or at any other time, and the Commonwealth will not be able to establish any criminal intent on the Defendant's part.

In regard to the charges related to Alleged Victim 8, which are set forth in Count 36, Involuntary Deviate Sexual Intercourse in violation of 18 Pa. C.S.A. Section 3123(a)(7) – (F1); Count 37, Indecent Assault in violation of 18 Pa. C.S.A. Section 3126(a)(8) – (M2); Count 38, Unlawful Contact with Minors in violation of 18 Pa. C.S.A. Section 6318(a)(1) – (F1); Count 39, Corruption of Minors in violation of 18 Pa. C.S.A.

Section 6301(a)(1) – (M1); and Count 40, Endangering Welfare of Children in violation of 18 Pa. C.S.A. Section 4304(a)(1) – (M1) as set forth in Criminal Information No. CP-14-CR-2422-2011, the Defendant submits the Commonwealth cannot present sufficient evidence to sustain these charges at trial. Since the Commonwealth has never identified Alleged Victim 8, and since the Commonwealth's only purported eyewitness is incapable of testifying at the Defendant's trial in these matters, the Defendant submits any testimony by other individuals concerning these allegations will constitute impermissible hearsay.

The *res gestae* exception to the hearsay exclusion has been said to be a dangerous rule which ought not to be extended beyond the limits of reasonably immediate spontaneous declarations made in connection with a startling event by one laboring under the stress of nervous excitement caused by it. Commonwealth v. Noble, 371 Pa. 138, 144-45, 88 A.2d 760, 763 (1952)

"Res gestae" is "a generic term encompassing four specific exceptions to the hearsay rule: (1) declarations as to present bodily conditions; (2) declarations of present mental states and emotions; (3) excited utterances; and (4) declarations of present sense impressions." Commonwealth v. Pronkoskie, 477 Pa. 132, 136-37, 383 A.2d 858, 860 (1978). In this case, we are concerned with excited utterances as the other three require a much more simultaneous outburst than that required by exception No. 3.

In Commonwealth v. Stallworth, 566 Pa. 349, 781 A.2d 110, 119–120 (2001), the Superior Court held, that for a statement to be considered an excited utterance, it must be made spontaneously and without opportunity for reflection:

> [A] spontaneous declaration by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just participated in or closely witnessed, and made in reference to some phase of that occurrence which he perceived, and this declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties.... Thus, it must be shown first, that [the declarant] had witnessed an event sufficiently startling and so close in point of time as to render her reflective thought processes inoperable and, second, that her declarations were a spontaneous reaction to that startling event. Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704, 712 (1992), *quoting* Commonwealth v. Green, 487 Pa. 322, 409 A.2d 371, 373–74 (1979).

There is no clearly defined time limit within which the statement must be made after the startling event in order to be admissible under the excited utterance exception to the hearsay rule, and the determination is factually driven, made on a case-by-case basis. Commonwealth v. Wholaver, 989 A.2d 883, 605 Pa. 325 (2010).

When determining whether a statement is an excited utterance and admissible under the excited utterance hearsay exception, the following factors must be considered: whether the statement was in narrative form, the elapsed time between the startling event and the declaration, whether the declarant had an opportunity to speak with others and whether, in fact, he did so. Croyle v. Smith, 918 A.2d 142, 2007 PA Super 46.

For a statement to be considered an excited utterance and, thus, admissible under excited utterance hearsay exception, it must be made spontaneously. Croyle v. Smith, 918 A.2d 142, 2007 PA Super 46. A spontaneous declaration is made by a person whose mind has been suddenly made subject to an overpowering emotion caused by some unexpected and shocking occurrence, which that person has just

participated in or closely witnessed, and is made in reference to some phase of that occurrence which he perceived. This declaration must be made so near the occurrence both in time and place as to exclude the likelihood of its having emanated in whole or in part from his reflective faculties; thus, it must be shown first, that the declarant had witnessed an event sufficiently startling and so close in point of time as to render his reflective thought processes inoperable and, second, that his declarations were a spontaneous reaction to that startling event. *Commonwealth v. Manley*, 985 A.2d 256, 2009 PA Super 227.

Relative to James Calhoun's purported statements to his co-workers, it is necessary to break things down into separate occurrences. His comments to his coworker, Ronald Petrosky, were made some time after he allegedly saw the Defendant in the shower with Alleged Victim 8. This statement is arguably the most contemporaneous of the several retellings Mr. Calhoun gave that night. Even then, he had ample time to think and reflect. While case law does not require that an excited utterance be simultaneous with the shocking event, it does require some close relationship in time to the event. We know from the first Presentment that Petrosky also saw someone in the Assistant Coaches' shower and waited until the individuals left before starting to clean. Only then did Calhoun speak with him and relate what he claims to have seen or believes he saw. This first recitation of what he allegedly saw, even in conjunction with his distraught state of mind throughout the evening, allowed for plenty of time for reflection, thus undermining the inherent truthfulness of the statement and making it inadmissible under the excited utterance exception to the hearsay rule. In his comments to co-workers and his Supervisor, Jay Witherite, later that evening,

Calhoun was doing little more than retelling what he told Petrosky earlier. As they continued to discuss what he reportedly saw and what they should do about it, his recollection would necessarily have become more clouded, confused, and interpreted to the point that it was no longer reliable under the excited utterance exception to the hearsay rule. Accordingly, the only person who could conceivably testify to what Calhoun said is Petrosky, and that still requires a finding by the Court that the statement was made contemporaneously with the incident, which cannot be established, and that Calhoun had no time to reflect, which he ostensibly did and did not involve speaking from memory which he was doing.

Our courts have held the trial court did not abuse its discretion in a murder prosecution in excluding a defendant's statement to his brother, offered under the excited utterance exception to the hearsay rule, that he "only looked in the window" of the house where bodies of his wife and daughters were located, and his "you won't believe what I saw" statement did not relate to a startling event, but merely was an expression whereby the defendant distanced himself from the crime, and the five to ten minutes between when defendant left his brother in a car and when he returned was sufficient time for him to engage in reflective thought, even if he actually first saw bodies through a window as he asserted. *Commonwealth v. Wholaver*, 989 A.2d 883, 605 Pa. 325 (2010).

Our courts have held an eyewitness' statements to a police officer, which were given approximately ten (10) minutes after a motorcyclist's accident with a tractor trailer, did not constitute an excited utterance so as to be admissible under the excited utterance hearsay exception in a negligence action brought by motorcyclist against the

driver of a tractor trailer; the eyewitness had spoken to the driver and checked to make sure the motorcyclist was okay prior to making his statement, the eyewitness' statement was in response to a question posed by the officer, and the eyewitness' statement was in a narrative form, not a single reaction to the accident. *Croyle v. Smith*, 918 A.2d 142, 2007 PA Super 46.

In a prosecution for voluntary manslaughter and possession of instrument of a crime, the nature of statements made by a defendant to a police officer forty-five (45) minutes after a struggle which resulted in the victim's death established that the time between the event and the statements left room for inventive forces, and thus, such statements were not admissible under the excited utterance exception to the hearsay rule. *Commonwealth v. Zukauskas*, 462 A.2d 236, 501 Pa. 500 (1983). For all the aforementioned reasons, the Defendant submits the aforementioned statements of Mr. Calhoun constitute inadmissible hearsay.

The Defendant also submits that, even if the Court should determine the aforementioned hearsay evidence is admissible at the Defendant's trial under the excited utterance exception to the hearsay rule, such hearsay evidence, standing alone, is insufficient to establish the elements of the offenses relating to Alleged Victim 8. In *Commonwealth v. Barnes*, 310 Pa. Super. 480, 456 A.2d 1037, 1983, the Superior Court held that where there is no independent evidence that a startling event has occurred, an alleged excited utterance cannot be admitted as an exception to the hearsay rule. Our courts reaffirmed the *Barnes'* decision in *Commonwealth v. Keys*, 2003 Pa. Super. 5, 814 A.2d 1256. The *Keys'* court followed *Barnes* in refusing to "conclude that the wife's excited utterance, absent independent proof; demonstrated

that the startling event occurred". The *Keys'* court further found "that the officer's observations of her agitated state did not independently establish the startling event". Additionally, the court found "[n]o testimony was presented that the wife did not 'engage in a reflective thought process' prior to her contact with the police officer". Based upon the foregoing case law, the Defendant submits, even if the Court determines that the purported hearsay statements of Mr. Calhoun are admissible at the Defendant's trial as an excited utterance exception to the hearsay rules of evidence, such evidence, nevertheless, is insufficient, standing alone, to permit the charges associated with the allegations involving Alleged Victim 8 to be considered by the jury. For all the aforementioned reasons, the Defendant submits the charges related to Alleged Victim 8 as set forth in Counts 36 through 40 of Criminal Information No. CP-14-CR-2422-2011 should be dismissed by the Court.

The Commonwealth has argued that, since the Defendant waived his preliminary hearings in the aforementioned matters, he cannot now seek to litigate the sufficiency of these charges through a pre-trial *writ of habeas corpus*. The Commonwealth argues that a waiver of a preliminary hearing also constitutes a waiver of the right to pursue a *writ of habeas corpus* by way of a pre-trial motion. The Defendant submits this is an incorrect assumption on the part of the Commonwealth that a waiver of a preliminary hearing is a concession that the Commonwealth can establish a *prima facie* case as to all elements of all the charges. There are many reasons why a defendant waives his preliminary hearing other than conceding the Commonwealth can establish a *prima facie* case against him as to those charges. For example, in many jurisdictions, in order for a defendant to apply for a diversionary program such as ARD, the Defendant

must waive his preliminary hearing. If after waiving his hearing, the Commonwealth advises the defendant he has not been approved for placement in the ARD Program, a defendant can certainly still pursue a sufficiency of the evidence claim by filing a pre-trial petition for *writ of habeas corpus*. Likewise, in many instances, the Commonwealth may advise the defendant and his counsel that, if he proceeds with a preliminary hearing, a more lenient plea offer may not be offered at a later date, but the defendant can still litigate a sufficiency of the evidence claim at a later date. In the instant case, the Defendant waived his preliminary hearing only after his counsel reached an agreement with the Commonwealth it would not seek an increase in bail in his cases prior to trial.

The waiver which the Defendant signed in the instant cases is clear in its language and states:

> I, the undersigned, certify that I waive my right to a preliminary hearing. I understand that I have the right to this hearing, at which time I have the right to:
>
> 1. to be represented by counsel;
> 2. cross-examine witnesses;
> 3. inspect physical evidence offered against me;
> 4. call witnesses on my own behalf, offer evidence on my own behalf and testify;
> 5. make written notes of the proceeding or have my own counsel do so, and make a stenographic, mechanical, or electronic record of the proceedings.
>
> I understand that if a prima facie case of guilt is not established against me at this hearing, the charges against me would be dismissed.

Signing a waiver of preliminary hearing form does give up certain rights, but nowhere does it state the defendant is conceding the Commonwealth can make out a *prima facie* case. All the form states is that, if a *prima facie* case is not established at the hearing, the charges will be dismissed. It says nothing about conceding that the

Commonwealth can make out such a case. There is no mention on the preliminary hearing waiver signed by the Defendant in these matters that, by signing it, the Defendant was giving up his right to petition the Court of Common Pleas for a *writ of habeas corpus*. Moreover, the Pennsylvania Supreme Court has held a waiver of constitutional rights must be intelligent and knowing, and hence affirmatively made while the Supreme Court of the United States has aptly stated: "no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on citizens' abdication of their rights through unawareness of their constitutional rights." *Escobedo v. Illinois*. 378 U.S. 478. 490 (1964). See also: *Commonwealth v. Hines*, 437 A.2d 1180, 1187 (Pa. 1981).

In the instant case, there was no indication on the waiver of preliminary hearing form of the existence of the Defendant's right to file a petition for writ of habeas corpus, let alone any mention that the Defendant was giving up that right when he signed the form. Thus, the preliminary hearing waiver could not possibly be an "intelligent and knowing, and hence affirmatively made" waiver of the Defendant's constitutional right to file a petition for *writ of habeas corpus* at a later date.

The proper means for testing whether the Commonwealth has sufficient evidence to establish a *prima facie* case is to petition the trial court for a *writ of habeas corpus*. *Commonwealth v. Morman*, 541 A.2d 356, 357 (Pa. Super. 1988). The *Morman* Court recognized the importance and history of the 'great writ' and that the writ exists "to vindicate the right of personal liberty in the face of unlawful government deprivation." *Id* at 358. The *writ of habeas corpus* is an ancient writ, inherited from the English common law, and lies to secure the immediate release of one who is detained

unlawfully. Id. Its root principle is that, in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform to the fundamental requirements of law, the individual is entitled to his immediate release. Id. (*quoting* Fay v. Nona, 372 U.S. 391, 402 (1963). The *writ of habeas corpus* exists to vindicate the right of personal liberty in the face of unlawful government deprivation... [T]he right to the protections afforded by the *writ of habeas corpus* have long been part of our Commonwealth's history. Id. at 358-59.

It would be inconsistent with the history and purpose described above to consider a waiver of a preliminary hearing – which is not a constitutional right but merely one established by the legislature, Com. ex rel. Guárico v. Keenan, 124 A.2d 144, 147 (Pa. Super. 1956) – as a waiver of the constitutional right to petition for a *writ of habeas corpus.*

The Supreme Court has strongly implied that, even if a defendant waives his preliminary hearing and thus chooses not to litigate some issue that could have been raised at that time, he does not thereby waive his right to litigate that same issue as part of his omnibus pre-trial motion. Commonwealth v. Cosgrove, 680 A.2d 823, 826-27 (Pa. 1996). Although Cosgrove involved a question of whether there was proper jurisdiction rather than a question of whether there was *a prima facie* case, since the Supreme Court did not consider the waiver of a preliminary hearing a waiver of the non-constitutional right to challenge in an omnibus pretrial motion the Attorney General's jurisdiction, it would certainly not consider the waiver of a preliminary hearing a waiver of the constitutional right to file a petition for *writ of habeas corpus.*

In a recent Supreme Court case, the defendant waived his preliminary hearing and then filed a petition for *writ of habeas corpus* as part of his omnibus pre-trial motion. Commonwealth v. Kelley, 801 A.2d 551, 553 (Pa. 2002). The Supreme Court in ruling on whether various charges should have been dismissed pursuant to the habeas hearing never even intimated that the defendant had no right to file a petition for *writ of habeas corpus* because he had waived his preliminary hearing. Id. In fact, in its Memorandum of Law in Opposition to Defendant's Pre-Trial Motions filed in Commonwealth v. Timothy M. Curley and Commonwealth v. Gary Charles Schultz to Dauphin County CP-22-CR-5165-2011 and CP-22-CR-5164-2011, the Commonwealth conceded on Page 8 of its Memorandum that it is settled a *habeas corpus* hearing is similar to a preliminary hearing, but different, in the respect that, in a *habeas corpus* proceeding, the Commonwealth has the opportunity to present additional evidence to establish the Defendant has committed the elements of the offenses charged.

The Defendant submits he has the constitutional right to challenge the sufficiency of the evidence through a petition for *writ of habeas corpus* and submits he has only done so in regard to the allegations related to Accuser/Alleged Victims 2, 6 and 8 for which the Defendant submits there are valid evidentiary issues which should be decided by the Court through a petition for *writ of habeas corpus* as opposed to the charges set forth regarding the other Accusers/Alleged Victims in which the Defendant has accepted the Commonwealth's representation that these identifiable individuals would allege that certain inappropriate contact occurred between them and the Defendant while they were minors. While the Defendant has always disputed these allegations and maintained his innocence in regard to them, he acknowledges that;

since credibility is not an issue in a pre-trial setting, these allegations, if made in such a proceeding, would constitute sufficient evidence for those charges to be presented to a jury for the jury's consideration.

For all the aforementioned reasons, the Defendant submits the Commonwealth cannot establish sufficient proof at his trial as to any of the aforementioned charges set forth in Counts 7 through 11 relating to Alleged Victim 2, Counts 28 through 31 relating to Accuser/Alleged Victim 6, and Counts 36 through 40 relating to Alleged Victim 8 to be presented to the jury, and requests that this Court enter an Order dismissing Counts 7 through 11, Counts 28 through 31, and Counts 36 through 40 in Criminal Information No. CP-14-CR-2422-2011 filed against the Defendant in these matters.

C. Motion to Compel Commonwealth to Provide Defendant with Written Statement of Uncharged Misconduct Evidence

The Commonwealth has previously advised Defendant's counsel as well as the Court in its response to the Court's Order dated February 13, 2012 that it may possess certain alleged misconduct on the part of the Defendant which is currently the subject of a continuing Grand Jury investigation and which, according to the Commonwealth, it is not required to provide to the Defendant due to the secrecy of the Grand Jury proceedings. By Order dated April 12, 2012, the Court ordered the Commonwealth to deliver a written statement of any uncharged misconduct evidence forthwith or immediately after the delivery of any such evidence may be authorized by the Supervising Judge of the Investigative Grand Jury. If the Commonwealth fails or refuses to advise the Defendant of any additional alleged misconduct in its possession, the Defendant submits any such alleged misconduct should not be admissible against him at his trial in these matters. If the Commonwealth does not advise the Defendant of

any additional alleged misconduct in its possession in a specific written form by a date certain, prior to the commencement of jury selection in his cases, the Defendant requests that this Honorable Court enter an Order directing that any such misconduct evidence shall not be admissible against him at his trial for any purpose. If the prosecution intends to offer such evidence, the Defendant will need adequate notice in time to prepare his defense to the same consistent with his rights under the Fifth and Sixth Amendments to the United States Constitution as applied to the Commonwealth of Pennsylvania through the Fourteenth Amendment, as well as under the due process clause of the Constitution of the Commonwealth of Pennsylvania.

Pursuant to Pa. R.E. 404(b)(4), the Defendant is requesting this Honorable Court to enter an Order directing the Commonwealth to provide the Defendant and his counsel with a specific written delineation of any such alleged acts of misconduct forthwith and prior to the commencement of jury selection in his cases so he may properly prepare to defend against these allegations at trial.

For all the aforementioned reasons, the Defendant respectfully requests that this Honorable Court enter an Order compelling the Commonwealth to provide him with a written statement at least thirty (30) days prior to the commencement of his trial listing the nature, dates, and places of occurrences of any criminal offenses or acts of misconduct other than those specified in the Criminal Informations filed in his current cases which the Commonwealth intends to introduce at his trial, either in its case in chief or by examination of the Defendant should he elect to testify or on rebuttal, and the purpose for which the Commonwealth will seek to admit such evidence or, in the alternative, enter an Order prohibiting the Commonwealth from introducing any such evidence.

D. Motion to Compel Limited Compliance with Defendant's Subpoenas *Duces Tecum*

The Defendant issued subpoenas *duces tecum* to Verizon, Verizon Wireless, AT&T, Nextel/Sprint and T-Mobile, for phone records of the known Accusers/Alleged Victims. To date only Verizon has provided Defendant's counsel with a partial response to the aforementioned subpoenas *duces tecum*. The Defendant submits at least several, if not more, of the Accusers/Alleged Victims knew each other from participating in Second Mile events and had contact with each other outside their participation in these events. The Defendant submits a significant part of his defense in these matters is that the Accusers/Alleged Victims have communicated with each other since the onset of the Office of Attorney General's investigation into these matters commencing sometime in late 2008 and have collaborated on their allegations against the Defendant, which the Defendant has always maintained were false. The Defendant submits he needs information concerning the Accusers'/Alleged Victims' phone and text records in order to confirm that the Accusers/Alleged Victims did in fact communicate with each other throughout the investigation conducted by the Office of Attorney General in these matters between September 2008 and February 2012.

For all the aforementioned reasons, the Defendant is respectfully requesting this Court to enter such Order as the Court deems appropriate to the aforementioned phone carriers directing them to comply by a date certain with so much of the Defendant's subpoenas *duces tecum* as the Court deems appropriate in light of the Court's Order dated May 10, 2012 regarding certain portions of the Defendant's subpoenas *duces tecum* issued to other third parties in his cases.

E. Motion for Early Release of Grand Jury Materials

Defendant's experts have expressed the need to review certain Grand Jury materials including the testimony of Accusers/Alleged Victims in the Defendant's cases. The aforementioned experts have indicated their need to obtain these materials in order to review them and render effective opinions both prior to and during trial relating to the Accusers/Alleged Victims as well as the Defendant's behavior. The Grand Jury Judge's initial Opinion in which he indicated he would release certain Grand Jury materials ten (10) days prior to the commencement of trial in the Defendant's cases does not allow an adequate amount of time for the aforementioned experts to review necessary Grand Jury materials related to the Defendant's cases and render meaningful opinions concerning those materials prior to and during trial in the Defendant's cases. The Commonwealth has requested the Defendant and his counsel to provide the Commonwealth with opinions and reports of the Defendant's experts at least thirty (30) days prior to trial. The Defendant is unable to provide the Commonwealth with this requested information due to the inability of the Defendant and counsel to obtain the necessary information for his experts to review and evaluate and from which the Defendant's experts can render opinions and prepare reports at least thirty (30) days prior to trial in these matters.

The Defendant submits his right to due process as guaranteed under the Sixth Amendment to the U.S. Constitution and as applied to the Commonwealth through the Fourteenth Amendment to the U.S. Constitution as well as under the due process clause of the Constitution of the Commonwealth of Pennsylvania will be unduly and irreparably prejudiced if he is unable to provide his expert witnesses with the

aforementioned materials as soon as possible so they can adequately and meaningfully evaluate these materials prior to trial and render expert opinions in the form of reports prior to trial and through testimony at trial in the Defendant's cases. The Defendant recognizes this Court's previous holdings that Grand Jury matters must be addressed to the Grand Jury Supervising Judge in the Defendant's cases. Nevertheless, the Defendant is requesting that this Honorable Court advise the Grand Jury Supervising Judge that release of the aforementioned Grand Jury materials at an earlier time than originally ordered by the Grand Jury Supervising Judge will best serve the interests of justice and help enable the Defendant and his experts to properly review those materials and prepare expert opinions and reports at least thirty (30) days prior to trial, as requested by the Commonwealth, and ensure a more efficient presentation of the Defendant's expert testimony at trial in these matters.

For all the aforementioned reasons, the Defendant requests that this Honorable Court request that the Grand Jury Supervising Judge release the aforementioned materials to Defendant's counsel as soon as possible to effectuate the purposes set forth above.

F. <u>Motion for Supplemental Juror Questionnaire</u>

The Defendant requests that a Supplemental Juror Questionnaire be submitted to perspective jurors prior to oral questioning in his cases. The use of such a supplemental questionnaire, as part of the jury selection process, is within the discretion of the Court. The use of a supplemental questionnaire is particularly appropriate in these cases because they involve numerous allegations of child sexual abuse of a

number of children and have garnered ongoing and prolific local, statewide and national media coverage.

Child sexual abuse is unfortunately fairly prevalent in American society. National statistics from the Bureau of Justice Statistics report that 67% of all sexual assault victims reported to law enforcement agencies were between twelve (12) and eighteen (18) years of age. In that age category, of the alleged offenders, 24.3% were family members of their victims and 66% were acquaintances of their victims (*Snyder, H., National Center for Juvenile Justice*, July 2000, NCJ 182990). Thus, a number of jurors in the panel can be expected to have personal knowledge of or experience with sexual abuse.

The Defendant is entitled to inquire into the experiences of prospective jurors concerning this subject in order to determine whether they, or persons close to them (including family members), have ever been the victim of sexual misconduct. It is necessary to evaluate juror attitudes and experiences on this subject because of the potential to produce predisposition or prejudgment, which could easily affect a juror's ability to decide this case fairly and impartially. This is information that the Defendant's counsel must have in order to determine whether prejudice exists which would justify a cause challenge, or in the alternative, to intelligently exercise peremptory challenges.

Child sexual abuse and assault is obviously a very private and potentially painful subject. Parents have difficulty talking to their own children about sexual matters in the comfort of their own homes. Many potential jurors will have great difficulty talking candidly about such experiences in front of other jurors. They are likely to feel embarrassed and possibly resentful if they are compelled to answer such

questions in front of others. In fact, some may not be willing to come forward publicly with such information in spite of their oath. The use of a confidential supplemental questionnaire would protect and respect the privacy of potential jurors and, at the same time, meet the needs of the attorneys for the parties.

The Defendant has also requested that those prospective jurors who state that either they, persons in their family, or persons they are close to, have been the victim of physical or sexual misconduct be questioned about this matter out of the hearing of the panel of prospective jurors. Individual sequestered *voir dire* on this subject would avoid unnecessary embarrassment and would further protect their privacy concerning this very personal and sensitive topic. These steps would meet the requirements of Standard 7(c) of the *ABA Standards Relating to Juror Use and Management*, which requires reasonable protection of juror privacy.

Finally, the proposed supplemental questionnaire would also increase the efficiency of the *voir dire* process. The questionnaire covers some other basic demographic information which would otherwise be part of the oral *voir dire* – information about crime victim status, knowledge of law enforcement or other law related personnel, specific knowledge of witnesses and parties. This too is consistent with Standard 7(a) of the *ABA Standards Relating to Juror Use and Management* which advises that such information be made available to the attorneys for the parties prior to the commencement of the *voir dire* process.

Including these questions on the supplemental questionnaire will save additional time. Follow-up questions, based on responses to the questionnaire, can be pursued in an efficient manner to complete the *voir dire* process. The Defendant

volunteers to do the necessary photocopying and distribution of the completed questionnaires to the attorneys for the Commonwealth, if the Court wishes. This will minimize the expense and burden on the Court's personnel.

For all the aforementioned reasons, the Defendant requests that this Honorable Court grant his motion for a supplemental juror questionnaire.

G. Defendant's Third Motion to Compel Pre-Trial Discovery

The Defendant's Thirty-Seventh through Fiftieth Supplemental Pre-Trial Discovery Requests were submitted to Commonwealth attorneys on May 3, 2012 and May 4, 2012. To date, the Commonwealth has failed to provide the Defendant with responses to the aforementioned discovery requests.

For the aforementioned reason, the Defendant respectfully requests that this Court enter an Order applying the sanctions of Rule 573 to dismiss the above-captioned prosecution; or, in the alternative, prohibit the Commonwealth from introducing at the time of trial, as evidence, those items and information requested, but not disclosed; or, in the alternative, order the Commonwealth to permit discovery and/or inspection of those aforementioned items and information requested, and it is further requested that this Court order such compliance by a date certain so that the Defendant can properly prepare his defense in this matter.

H. Motion for Continuance

The Defendant incorporates all those reasons set forth in his Motion for Continuance filed on or about May 9, 2012 with this Honorable Court. By way further support for his continuance request, the Defendant submits continuance requests are generally governed by Pa. R. Crim. P. 106 which states in part:

> (A) The court or issuing authority may, in the interests of justice, grant a continuance, on its own motion, or on the motion of either party.

It is well settled that the grant or denial of a continuance to procure an absent witness lies within the discretion of the trial court. Commonwealth v. Smallhoover, 389 Pa. Super. 575, 587, 567 A.2d 1055 (1989). A witness is considered "absent" for purposes of this analysis when he has asserted his Constitutional right against self-incrimination and is therefore "unavailable". The two concepts – absent and unavailable – are synonymous for this analysis. The "true test of unavailability is the unavailability of the witness' testimony, not his or her person". Commonwealth v. Jones, 344 Pa. Super. 420, 430, 496 A.2d 1177, 1182 (1985), *quoting* Commonwealth v. Rodgers, 472 Pa. 435, 453, 372 A.2d 771, 779 (1977).

Where a witness bases his unavailability upon a claim of Fifth Amendment privilege, the trial court must ascertain whether the witness' concern with self-incrimination is legitimate. Commonwealth v. McGrogan, 523 Pa. 614, 621-22, 568 A.2d 924, 928 (1990). As stated in Commonwealth v. Carrera, 424 Pa. 551, 553-4, 227 A.2d 627, 629 (1967): "When an individual ... is called to testify ... in *a* judicial proceeding, he or she is not exonerated from answering questions merely upon the declaration that in so doing it would be self-incriminating. It is always for the court to judge if the silence is justified, and an illusory claim should be rejected". See *also*, Commonwealth v. Allen, 501 Pa. 525, 462 A.2d 624 (1983); Commonwealth v. Rolon, 486 Pa. 573, 406 A.2d 1039 (1979); Commonwealth v. Rodgers, supra.

Beyond that initial analysis, the court must consider several factors in exercising its discretion. Among these factors are whether the absent witness is

necessary to the defense, the facts to which the witness would testify, a party's diligence in procuring the witness, and the likelihood that the witness can be produced for trial. Commonwealth v. Smallhoover, supra, *citing* Commonwealth v. Plath, 267 Pa. Super. 1, 405 A.2d 1273 (1979) *and* Commonwealth v. Foreman, 248 Pa. Super. 369, 375 A.2d 142 (1977).

The Superior Court has also held that the denial of a defendant's request for a continuance of a criminal prosecution was a clear abuse of discretion where the request was the defendant's first request for continuance, the request was made promptly, there was no suggestion of bad faith or of any attempt to avoid or delay trial, and the denial of the request prejudiced the defendant by effectively denying his counsel the ability to impeach the Commonwealth's principal witnesses. Commonwealth v. Patterson, 421 A.2d 1178, 281 Pa. Super. 122 (1980).

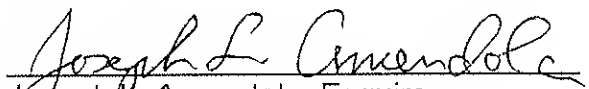
In Patterson, supra, the trial court denied the defendant's request for a continuance to afford counsel time to obtain the notes of testimony from the suppression hearing. The Superior Court held this denial to be a clear abuse of discretion. The request was defendant's first request for a continuance, and it was made promptly; there was no suggestion of bad faith, or of any attempt to avoid or delay the trial. The Superior Court held that the denial of the request prejudiced the defendant by effectively denying his counsel the ability to impeach the Commonwealth's principal witnesses. *Cf.* Commonwealth v. Glover, 265 Pa. Super. 19, 401 A.2d 779 (1979) (denial of continuance upheld because no prejudice where counsel, in cross-examining Commonwealth witnesses, had and used notes of testimony of the suppression hearing). The court went on to state that "to uphold the denial would represent an unfortunate precedent; for it

would suggest that whenever, as here, a case is listed for trial almost immediately after the suppression hearing, a defense request for a continuance could properly be denied, even though that denial might effectively prevent the impeachment of the Commonwealth's witnesses".

Additionally, the opinion in *Commonwealth v. Bellacchio* seems to suggest a witness who is unavailable via assertion of his Fifth Amendment privilege, where the witness is also facing charges but has not yet resolved those charges, may be a valid basis for a continuance, but the court found the issue was waived for lack of preservation in the lower court. *Commonwealth v. Bellacchio*, 442 A.2d 1147, 296 Pa. Super. 468 (1982).

For all the aforementioned reasons, including those reasons set forth in the Defendant's Motion for Continuance filed on or about May 9, 2012, the Defendant respectfully requests that this Honorable Court grant his request for a continuance.

Respectfully submitted,

BY: 

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Date: May 17, 2012

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CRIMINAL DIVISON

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
vs.	)	Nos. CP-14-CR-2421-2011 &
	)	CP-14-CR-2422-2011
GERALD A. SANDUSKY	)	
Commonwealth Attorneys:		*Joseph McGettigan, Esquire*
		Jonelle H. Eshbach, Esquire
Defense Attorney:		*Joseph L. Amendola, Esquire*

CERTIFICATE OF SERVICE

AND NOW, this 17th day of May, 2012, I, Joseph L. Amendola, hereby certify that I have, this date, served a copy of the foregoing document, by:

Hand Delivery

Hon. John M. Cleland, Senior Judge
c/o Ms. Maxine Ishler, Court Administrator
Centre County Courthouse
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Bellefonte, Pennsylvania 16823

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